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6 Attorneys for Plaintiffs David and Ruth Waronker

7 **IN THE UNITED STATES DISTRICT COURT**  
8  
**DISTRICT OF ARIZONA**

9 David A. Waronker, a married man and Ruth  
10 A. Waronker, a married woman,

11 No.

12 Plaintiffs,

13 **VERIFIED COMPLAINT**

14 v.

15 Bank of America, N.A., a foreign corporation;  
16 BAC Home Loans Servicing, L.P., a foreign  
17 corporation; Jane Does I-X; John Does I-X;  
18 ABC Corporations I-X; and Black and White  
19 Business Entities I-X;

Defendants.

20 Plaintiffs David A. Waronker and Ruth A Waronker ("the Waronker's"), by and  
21 through their attorneys, Kunz Plitt Hyland & Demlong, for their Complaint against  
22 Defendants alleges as follows:

23 **JURISDICTION**

24 1. The United States District Court for the District of Arizona has jurisdiction  
25 over this matter pursuant to 28 U.S.C.A. § 1332(a) in that the matter in controversy  
exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between  
citizens of different states.

## PARTIES

2. Plaintiffs David A. and Ruth A. Waronker are citizens of the State of Arizona and residents of Maricopa County.

3. Upon information and belief, Bank of America N.A. (“Bank of America” or “the Bank”) is a citizen of Delaware and North Carolina, with it being incorporated in Delaware and its principal place of business being in Charlotte, North Carolina.

4. Upon information and belief, BAC Home Loans Servicing, L.P. (“BAC Home Loans”) is a wholly owned subsidiary of Bank of America, N.A. and is a citizen of California as its principal place of business is in Simi Valley, California.

## VENUE

5.      Venue in this Court is proper under 28 U.S.C.A. § 1391(b) as the property that is the subject of this action is situated in this judicial district.

**JURY DEMAND**

6. Plaintiffs demand a trial by jury on all claims so triable.

## **NATURE OF THE COMPLAINT**

7. In November 2005, the Waronker's entered into a contract to purchase their home, a single family residence located at 23448 North Church Road, Scottsdale, Arizona 85255 (the "Property").

8. The purchase price under the contract was \$1,475,000.00.

9. The Waronker's put down \$475,000.00 and financed the remaining \$1,000,000.00.

10. The Waronker's secured financing from Bank of America.

1       11. The first mortgage the Waronker's took on the Property was for  
2 \$1,000,000.00 and was financed through Bank of America loan number 6477351354 (the  
3 "Loan").

4       12. The Waronker's monthly mortgage payment under the Loan was \$6,120.84.

5       13. The Waronker's invested approximately an additional \$1 million into the  
6 Property in structural upgrades and renovations.

7       14. After investing approximately \$1 million into the Property, the Waronker's  
8 took a second mortgage on the Property for \$450,000.00, which was financed through  
9 Bank of America loan number 68218001010699.

10       15. The Waronker's initiated negotiations for modification of their first and  
11 second mortgages on the Property in June 2009.

12       16. The Waronker's second mortgage, Loan No. 68218001010699, was  
13 successfully and timely modified and has remained in good standing.

14       17. After four months of negotiations, on October 14, 2009, Bank of America,  
15 acting through its agent, Kathy Peavey, extended to the Waronker's an offer to modify  
16 their first mortgage (the "Offer"), a copy of which is attached hereto as Exhibit A.

17       18. The Offer expressly stated:

18               This letter constitutes our offer to modify the Mortgage  
19 identified above, subject to the terms and conditions agreement.  
20 When signed by you, this letter will also constitute your acceptance  
and agreement to these terms and conditions.

21               ...  
22               Indicate your acceptance of this offer for a Modified Mortgage  
23 under the terms and conditions outlined on pages 2 and 3 by signing  
24 the attached acceptance, which must be signed by each borrower and  
returned within seven days from the date of this latter. If we do not  
receive this signed acceptance letter, this offer will expire  
automatically without further notice.

1           19. Within twenty four hours of receiving the Offer, the Waronker's accepted.

2           20. As required by the express terms of the Offer, the acceptance was executed  
3 by both David and Ruth Waronker and was returned to Bank of America with a cashier's  
4 check in the amount of \$738.59 for payment of associated escrow fees.

5           21. Bank of America processed the cashier's check for \$738.59.

6           22. The Waronker's relied on the Offer that was extended by Bank of America,  
7 and their acceptance of that offer, which included consideration in the form of escrow  
8 fees.

9           23. The Waronker's did not receive any further communication from Bank of  
10 America regarding the modification and, in fact, were told that they would not receive the  
11 final papers related to the modification until they made three consecutive payments under  
12 the terms of the October 14, 2009 modification.

13           24. In reliance upon the Bank of America's Offer and their acceptance of the  
14 Offer, the Waronker's subsequently remitted to Bank of America a December 2009  
15 mortgage payment of \$4,078.91, the monthly payment amount set forth in the Offer. The  
16 December remittance was credited to Bank of America's account on January 4, 2010.

17           25. The Waronker's remitted subsequent payments on January 20, 2010, which  
18 was credited to Bank of America's account on January 27, 2010 and on February 15,  
19 2010, which was credited to Bank of America's account on March 2, 2010.

20           26. In December 2009, Bank of America forwarded to the Waronker's Florida  
21 address documents that offered a modification of the Loan under a program for which the  
22 Loan was not eligible. Understanding the offer to have been made in error, and knowing  
23 that the papers did not relate to the October 2009 modification as three consecutive  
24 mortgage payments had not yet been made, Mr. Waronker disposed of the documents.

1       27. In January 2010, a Bank of America representative contacted Mr. Waronker  
2 and inquired as to why the December 2009 loan modification documents had not been  
3 executed and returned.

4       28. Mr. Waronker conveyed to this individual that the Loan had been  
5 effectively modified in October 2009 and the December 2009 papers had been sent in  
6 error.

7       29. Bank of America's representative conveyed to Mr. Waronker that these  
8 types of mistakes happen all of the time, that Bank of America sometimes sends its  
9 clients two or three loan modification offers, sometimes even sending them after the  
10 client has lost or sold the home.

11       30. The representative assured Mr. Waronker that the matter could be resolved  
12 and attempted to conference in a second Bank of America customer service  
13 representative. Mr. Waronker was disconnected from the call, and the Bank of America  
14 representative who had contacted him did not make contact or attempt to contact Mr.  
15 Waronker again.

16       31. Assuming the matter was resolved, the Waronker's continued to make their  
17 monthly mortgage payments in the amount set forth in the Offer.

18       32. In March 2010, however, Mr. Waronker reviewed his account with Bank of  
19 America and realized that the Bank was not crediting his payments under the Loan  
20 modification. Rather, the payments were being credited as though the modification had  
21 never occurred.

22       33. Upon recognizing Bank of America's error, Mr. Waronker began efforts to  
23 correct it. During the month of March, he made numerous calls to Bank of America's  
24 customer service center, but no one was able to help him.

1       34. On March 22, 2010, Mr. Waronker spoke with Kevin Gandi and Mr. Gandi  
2 informed Mr. Waronker that the Bank could not find the Loan modification paperwork  
3 and that the Waronker's were in default.

4       35. Unwilling to continue having his payments credited towards late fees and  
5 penalties on a loan which was no longer in effect, but on which Bank of America  
6 considered the Waronker's to have defaulted, on March 23, 2010, Mr. Waronker placed a  
7 stop payment on that month's mortgage payment.

8       36. On April 1, 2010, Mr. Waronker went to the Bank of America Pima  
9 Pinnacle Peak Banking Center in Scottsdale, Arizona and spoke with the branch manager.  
10 The manager contacted Bank of America regarding the problem and was informed that  
11 Bank of America could not find the loan modification paperwork. The manager faxed to  
12 the Bank of America home loan department a copy of the Loan Modification as well as  
13 copies of the processed checks reflecting continuous timely mortgage payments  
14 beginning in December 2009.

15       37. It was affirmatively represented to Mr. Waronker that the matter would be  
16 resolved within two weeks; however, no one from Bank of America ever communicated  
17 anything more to the Waronker's.

18       38. In mid-April, BAC Home Loans mailed to the Waronker's a Notice of  
19 Intent to Accelerate dated April 5, 2010. The Notice of Intent to Accelerate indicates that  
20 the Waronker's owe nearly \$50,000.00 in past due payments, late charges, and other fees  
21 and threatens foreclosure of the property.

22       39. On April 15, 2010, Mr. Waronker spoke with Kim Mehta, a Bank of  
23 America representative in the home retention department, who acknowledged to Mr.  
24 Waronker that Bank of America had made an obvious error.

1       40. Ms. Mehta represented to Mr. Waronker that she would need approximately  
2 ten days to correct the error, that she would personally attend to it, and that she would  
3 personally contact him once the matter was resolved. Mr. Waronker expressed his  
4 skepticism, telling Ms. Mehta that these representations had been made before. Ms.  
5 Mehta responded stating that she was different and that she would call him back. Ms.  
6 Mehta never called.

7       41. On May 5, 2010, Mr. Waronker spoke with a Bank of America customer  
8 service representative supervisor named Lorraine. Like the customer service  
9 representatives before her, Lorraine acknowledged the Bank's error and affirmatively  
10 represented to Mr. Waronker that she would resolve the issue. She asked to place Mr.  
11 Waronker on hold. Mr. Waronker suggested that she take his number down in case he  
12 was disconnected. Lorraine indicated that it would not be a problem and that she would  
13 get back to him. While on hold, Mr. Waronker was transferred to another Bank of  
14 America customer service representative in a different Bank of America department who  
15 had no idea why he was calling and stated that he could not do anything to help him.  
16 Lorraine never contacted the Waronker's.

17       42. On May 13, 2010, Mr. Waronker made his final call to Bank of America.  
18 At that time he spoke with two different customer service supervisors: Debbie and Steve.  
19 Both assured him that they recognized the problem and they would work to resolve it.  
20 Both calls concluded without resolution of the underlying issue; neither call was followed  
21 with a return call from Bank of America.

22       43. On June 7, 2010, the Waronker's received a Statement of Breach or Non  
23 Performance and Election to Sell Under Deed of Trust Arizona, Notice of Trustee's Sale  
24 Arizona, and a document titled "Important Legal Notice".

1       44. On June 8, 2010, undersigned counsel corresponded with Barbara J.  
2 Desoer, President of Bank of America's Home Loans division and Ed O'Keefe, General  
3 Counsel for Bank of America Corporation. The correspondence requested that someone  
4 from Bank of America contact undersigned counsel to discuss resolution of this matter on  
5 or before June 15, 2010. No one from Bank of America contacted undersigned counsel.

6       45. On July 9, 2010, undersigned counsel contacted Bank of America prior to  
7 filing a complaint for injunctive relief and seeking a temporary restraining order.

8       46. Undersigned counsel spoke with Kelly Freeman, a supervisor at Bank of  
9 America. Ms. Freeman researched the status of the loan and affirmed that an egregious  
10 error had been made and the loan should be administered under the terms of the Loan  
11 Modification. Ms. Freeman represented that all negative credit reporting, late fees, and  
12 attorneys' fees incurred related to the Trustee's sale would be reversed and arrangements  
13 would be made to allow the past due mortgage payments to be made.

14       47. Over the next few months, undersigned counsel worked with Ms. Freeman  
15 to ensure the Loan Modification was in force and to develop a payment plan for past due  
16 payments that was agreement with the parties.

17       48. On September 9, 2010, Ms. Freeman forwarded a Repayment Plan  
18 Agreement that purportedly made arrangements for payment of missed mortgage  
19 payments in accordance with the terms of the Loan Modification. The Repayment Plan  
20 Agreement, however, did not properly reflect the past due amounts and resulted in a  
21 monthly payment of almost \$10,000.00.

22       49. Undersigned counsel contacted Ms. Freeman and informed her that the  
23 terms of the Repayment Plan were unacceptable and the offer was rejected.

24       50. Ms. Freeman never communicated with undersigned counsel again.

1        51. The voicemail message on Ms. Freeman's telephone line indicated that the  
2 number was now assigned to someone else.

3 52. Undersigned counsel left numerous messages asking for Ms. Freeman's  
4 current contact information, but none of undersigned counsel's calls were returned.

5       53. Over the next six months, undersigned counsel and Mr. Waronker called  
6 Bank of America and requested that someone contact them regarding the Loan  
7 Modification.

8       54.    Bank of America has not communicated with undersigned counsel or Mr.  
9 or Mrs. Waronker since September 2010, except to inform Mr. and Mrs. Waronker, via a  
10 mass email sent on June 2, 2011, that BAC would no longer be serving the loan.

11       55. On March 4, 2011, undersigned counsel corresponded with Barbara Desoer  
12 and Ed O'Keefe, asking them to contact her prior to filing suit.

13        56. Neither Barbara Desoer, Ed O'Keefe, nor anyone from Bank of America  
14 ever contacted undersigned counsel.

15        57. On March 30, 2011 undersigned counsel corresponded with Barbara Desoer  
16 and Ed O'Keefe again and, again, received no response.

**COUNT I – DECLARATORY JUDGMENT**  
Defendants Bank of America and BAC Home Loans

18 58. Plaintiffs re-allege and incorporate by reference the allegations contained in  
19 all preceding paragraphs as if fully set forth herein.

20       59. Plaintiffs seek relief in this Court under 28 U.S.C. § 2201 *et seq.*, the  
21 Federal Declaratory Judgment Act and A.R.S. § 12-1831, *et seq.*, the Uniform  
22 Declaratory Judgments Act.

1       60. Bank of America extended to Plaintiffs an offer to modify their loan.  
2 Plaintiffs accepted the offer, in accordance with its terms. Consideration exists in the  
3 form of escrow fees and subsequent mortgage payments.

4       61.    Bank of America has breached the contract by improperly crediting the  
5 mortgage payments Plaintiffs made and refusing to acknowledge the October 14, 2009  
6 Loan Modification.

7 62. Bank of America has repeatedly refused to honor the contract.

8       63. Plaintiffs are a party in interest in the October 14, 2009 Loan Modification  
9 and are entitled pursuant to the provisions of 28 U.S.C. § 2201 *et seq.* and A.R.S. § 12-  
10 1831, *et seq.* to have their rights and legal relations declared as a matter of law as they  
11 relate to the October 14, 2009 Loan Modification.

12       64. Plaintiffs seek a declaration from this Court that a valid and enforceable  
13 contract exists between the parties and Bank of America has breached the October 14,  
14 2009 Loan Modification by refusing to acknowledge it and improperly applying  
15 mortgage payments, as though the Loan were never modified.

16 65. Plaintiffs seek a declaration from this Court that Bank of America and BAC  
17 Home Loans owe Plaintiffs a duty to comply with their contractual duties under the  
18 October 14, 2009 Loan Modification and apply all mortgage payments made subsequent  
19 to October 14, 2009 to the mortgage in accordance with the terms of the modification.

**COUNT II – BREACH OF CONTRACT**  
Defendants Bank of America and BAC Home Loans

22 66. Plaintiffs re-allege and incorporate by reference the allegations contained in  
23 all preceding paragraphs as if fully set forth herein.

1           67. A valid and enforceable contract modifying the terms of the Loan existed  
2 between the parties.

3       68.    Bank of America and/or its agent, BAC Home Loans, breached the Loan  
4 modification contract when they failed to process the Waronker's monthly mortgage  
5 payments in accordance with the terms of the contract.

6 69. As a result of the breach, the Waronker's have suffered damages and  
7 continue to suffer damages, including the potential loss of the Property, in an amount to  
8 be proven at trial.

### **COUNT III – CONSUMER FRAUD**

## Defendants Bank of America and BAC Home Loans

1 70. Plaintiffs re-allege and incorporate by reference the allegations contained in  
2 all preceding paragraphs as if fully set forth herein.  
3

3        71.      Bank of America and/or its agent, BAC Home Loans, represented to the  
Waronker's that it would modify the Loan in accordance with the terms of the Offer.

5 72. Bank of America and/or its agent, BAC Home Loans, made this representation in connection with the sale of a loan modification contract.

7           73.     Bank of America and/or its agent, BAC Home Loans misrepresented their  
8           willingness to modify the Loan in accordance with the terms of the Offer as they have  
9           subsequently failed to process the Waronker's monthly mortgage payments in accordance  
with the terms of the Offer.

74. These actions violate the Arizona Consumer Fraud Act.

22 75. The Waronker's accepted and relied upon Bank of American and/or BAC  
23 Home Loans' representations and as a result, have suffered consequent and proximate  
injury, including the potential loss of the Property, in an amount to be proven at trial.

## **COUNT IV- NEGLIGENT MISREPRESENTATION**

## Defendant Bank of America and BAC Home Loans

76. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs as if fully set forth herein.

77. Acting within the course of their business, profession, or employment, agents of Bank of American and/or BAC Home Loans supplied false information to the Waronker's in or about January 2010, on or about April 1, 2010, on or about April 15, 2010, on or about May 5, 2010, and on or about May 13, 2010.

78. On each of these occasions, agents of Bank of American and/or BAC Home Loans informed Mr. Waronker that the Bank had made an error in processing the Loan modification, and that the error would be corrected within approximately two weeks time.

79. The Waronker's justifiably relied on this information and, as a result, believed that the Loan modification would be accepted by the Bank and the errors in payment processing would be corrected.

80. As a result of the Waronker's justifiable reliance on the false information provided to them by the various Bank of America or BAC Home Loans customer service representatives, the Waronker's have suffered, and will continue to suffer, pecuniary loss, including the potential loss of the Property, in an amount to be proven at trial.

## COUNT V- NEGIGENT SUPERVISION

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## Defendant Bank of America and BAC Home Loans

81. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs as if fully set forth herein.

82. Bank of America and/or its agent, BAC Home Loans, knew or should have known that its employees were not competent to provide assistance to customers, like the Waronker's, seeking modification of their home loans.

1       83.     Bank of America and/or its agent, BAC Home Loans, knew or should have  
2     known that its employees were not competent to assist the Waronker's in correcting the  
3     Bank's error in properly processing the Loan modification and subsequent payment.

4       84. Employees of Bank of America and/or its agent, BAC Home Loans,  
5 conveyed to Mr. Waronker that errors in home loan modifications were occurring  
6 regularly.

7        85.    The employees of Bank of America and/or its agent, BAC Home Loans,  
8    were not properly supervised.

9       86.    As a result of Bank of America's and/or its agent, BAC Home Loans',  
10 failure to properly supervise its employees, the Waronker's have been injured in an  
11 amount to be proven at trial.

**COUNT VI- INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS**

**Defendant Bank of America and BAC Home Loans**

4       87. Plaintiffs re-allege and incorporate by reference the allegations contained in  
5 all preceding paragraphs as if fully set forth herein.

21       89. Bank of America and/or its agent, BAC Home Loans, recklessly  
22 disregarded the near certainty that their conduct would cause emotional distress to the  
Waronker's.

1           90. The Waronker's suffered, and continue to suffer, emotional distress as a  
2 result of Bank of America and/or BAC Home Loans' conduct.

3           WHEREFORE, Plaintiffs hereby pray for judgment in their favor and against  
4 Bank of America, BAC Home Loans, and as follows:

5           A. That this Court issue a declaration that a valid and enforceable contract  
6 exists between the parties in the form of the October 14, 2009 Loan Modification and that  
7 Bank of America has breached the contract.

8           B. That Plaintiffs be awarded compensatory damages in an amount to be  
9 determined at trial;

10           C. That Plaintiffs be awarded punitive or exemplary damages in an amount to  
11 be determined at trial;

12           D. That Plaintiffs be awarded damages for their emotion distress and mental  
13 anguish;

14           E. That Plaintiffs be awarded any other economic or non-economic damages  
15 that result from Defendants' conduct;

16           F. That Plaintiffs be awarded pre- and post-judgment interest at the highest  
17 applicable rate;

18           G. That Plaintiffs be awarded their attorneys' fees incurred in bringing this  
19 action, pursuant to A.R.S. § 13-341.01; and,

20           H. That this Court award such other and further relief as it deems just and  
21 proper under the circumstances.

1 DATED this 12<sup>th</sup> day of July, 2011.

2  
3  
**KUNZ PLITT HYLAND  
HYLAND & DEMLONG**

4 By: s/Aeryn A. Heidemann  
5 Aeryn A. Heidemann  
6 3838 N. Central Avenue, Suite 1500  
7 Phoenix, Arizona 85012-1902  
8 Attorneys for Plaintiffs

9  
10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on 12<sup>th</sup> day of July, 2011, I electronically transmitted the  
12 attached document to the Clerk's Office using the CM/ECF System for filing.

13  
14 s/L. Gilroy

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